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SITI AISYAH v. PP

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
RHODZARIAH BUJANG JCA
B [CRIMINAL APPEAL NO: B-05-622-12-2018]
29 MARCH 2019

CRIMINAL PROCEDURE: *Statements – Witness statements – Application for copies of witnesses' police statements recorded under s. 112 of Criminal Procedure*
C *Code – Application made at end of prosecution case and witnesses offered to defence – Whether statements subject to disclosure – Whether privileged documents – Whether disclosure provided under statute – Whether there was risk of tampering with witnesses – Whether police statements necessary and desirable for defence to advance its case – Whether refusal would result in miscarriage of justice*

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The appellant faced a charge of murder under s. 302 of the Penal Code. The prosecution completed its case and the court concluded that a *prima facie* case had been established. The appellant was ordered to enter her defence on the charge. The prosecution offered 93 witnesses to the defence. The appellant then applied, under s. 51 of the Criminal Procedure Code ('CPC'), for an
E order to direct the prosecution to provide to the appellant copies of statements of seven named witnesses recorded under s. 112 of the CPC ('police statements' or 'witness statements'). The High Court Judge ('HCJ') declined to make the order, holding that the police statements were not subject to disclosure as they were absolutely privileged documents. The judge
F further held that the statements could only be supplied if the prosecution had waived the privilege over the documents. The HCJ considered that there was no miscarriage of justice as the defence could interview the witnesses offered and decide accordingly whether to call them as defence witnesses. Aggrieved by the order, the appellant filed the appeal. The issue for the court's
G determination in this appeal was whether the prosecution could be ordered, at the end of the case for the prosecution, and where defence had been called, to furnish to the accused a copy of witness statements recorded under s. 112 of the CPC of witnesses offered to the defence, which were material and which may assist the defence case.

H **Held (allowing appeal; setting aside order of High Court)**
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Under s. 112(3) of the CPC, the person giving a police statement 'shall be legally bound to state the truth'. If the police statement is found to be false, its maker can be charged for giving false evidence under the
I Penal Code and its maker cannot claim that the communication between him and the police officer is privileged and, therefore, not admissible in

evidence. Further, pursuant to the amendment to the law in relation to admissibility of police statements, the court could intervene and order production of s. 112 CPC statements for the purposes of challenging and impeaching the credit of witnesses, as provided in s. 113(2) CPC. A police statement under s. 112 CPC can also be admitted in evidence in other situations as provided in sub-ss. 113(3), (4) and (5). Since statutory law allows such police statements to be admitted in evidence in certain circumstances, it seems that such police statements were never intended to be privileged documents. With the addition of s. 51A to the CPC, the prosecution has a duty to deliver certain documents to the accused prior to the commencement of the trial. (paras 19, 20 & 38)

(2) Admissibility of evidence is not only subject to rules of relevancy but also to the rules of exclusion. A witness can come to court and claim privilege as a ground for non-disclosure or even some ground of public policy where disclosure would be detrimental to the public interest. Therefore, although there are no statutory provisions which allow for disclosure of police statements, there are also no provisions which declare that such police statements shall not be disclosed. Further, based on the English common law principles, unless there are good reasons for non-disclosure, the prosecution has a duty to disclose and provide, from unused material, witness statements to the defence. Good reasons for disclosure may include the claim of public interest immunity by the prosecution or risk of disclosure of the identity of informers. (paras 21, 22, 32 & 33)

(3) Police statements are not to be considered as privileged pursuant to s. 32 of the Evidence Act 1950, wherein the last two paras. (i) and (j) were introduced in 1993. However, there was a dispute as to whether the paragraphs to be read conjunctively or disjunctively. The provisions of paras. (i) and (j) are plain and admit to only one interpretation. If the intention of the Legislature was for both paragraphs to be read conjunctively, it would have been unnecessary to have separate paragraphs. Hence, clearly, the intention of the Legislature was for the paragraphs to be independent of each other and to be read disjunctively. (paras 46, 47 & 49)

(4) The court disagreed with the proposition as advanced in *Husdi v. PP* ('*Husdi*') that police statements are absolutely privileged. In the upshot, *Husdi* should no longer be followed in this respect. However, *Husdi* may have been correct in its eventual outcome on the basis that, as a matter of public policy, it was undesirable for the prosecution to supply the defence with police statements as there is a real danger of tampering with the witnesses. Perhaps there were other reasons as well. The issue of tampering could only arise if such statements were provided prior to the

commencement of the trial. In the instant case, the contention of tampering was without merit as the prosecution had closed its case and the witnesses of whom the statements were sought were offered to the defence. Once witnesses were offered by the prosecution, they become defence witnesses. (paras 56 & 57)

(5) Under s. 51 of the CPC, the stage at which the application for disclosure is made is of primary importance. If the application is made before the commencement of the trial, the disclosure is limited to matters as stated in the charge. Anything more would be tantamount to the defence having inspection of the evidence of the prosecution prior to trial. Pre-trial disclosure in criminal cases could not be equated to the pre-trial discovery and inspection of documents in a civil proceeding. In exercising the discretion under s. 51 of the CPC, the court must have regard to the justice of the case. The application herein was made at the end of the case for the prosecution after defence had been called and witnesses offered to the defence. Based on what was disclosed as to the role of the witnesses and the relevance of their evidence, the police statements were certainly necessary and desirable for the defence to advance their case. (paras 63-65)

(6) The paramount duty of ensuring a fair trial falls on the court. In this context, and in the context of this appeal, a balance had to be struck between adequate prosecutorial disclosure and the public interest of the detection and punishment of crime. The process of the trial must not be undermined by unnecessary disclosure. But, if the demands of a fair trial so require, the court will not hesitate to invoke its inherent jurisdiction to prevent injustice or miscarriage of justice or abuse of process. Disclosure as in the present case was actually in the interest of the prosecution. If it turned out on appeal that the failure to disclose was a material irregularity that had occasioned a miscarriage of justice, the court would be duty-bound to set aside any such conviction for being unsafe. In the end, the prosecution may not get a second chance of securing a retrial. (paras 69 & 70)

(7) Where a claim of public interest immunity is asserted, it is inevitable that the court will be faced with competing public interests where disclosure is concerned. On the one hand is the public interest of preventing harm to the nation and the public service by such disclosure of documents. On the other hand is the public interest of promoting the fair and effective administration of justice where harm would be caused if the withholding of material evidence results in the court being unable to make a fair determination of the dispute. (para 72)

(8) There was a duty on the prosecution to disclose to the defence the police statements of the witnesses offered to the defence which were necessary and desirable to their case. Although there was no statutory obligation to do so, there was indeed such a duty at common law. There would certainly be a miscarriage of justice if the police statements, from especially the deceased persons and others who could not be brought to court as witnesses, were not provided to the defence. The court should not disturb any decision made in the exercise of a judge's discretion. However, that discretion was exercised on a misapprehension of the law which would result in a miscarriage of justice. Appellate interference was therefore warranted to prevent a miscarriage of justice and to ensure a fair trial. (paras 81 & 84)

Bahasa Malaysia *Headnotes*

Perayu menghadapi satu pertuduhan membunuh bawah s. 302 Kanun Keseksaan. Pihak pendakwaan menutup kesnya dan mahkamah memutuskan kes *prima facie* telah dibuktikan. Perayu diperintahkan membela diri atas pertuduhan tersebut. Pihak pendakwaan menawarkan 93 saksi kepada pembelaan. Perayu kemudian memohon, bawah s. 51 Kanun Tatacara Jenayah ('KTJ'), perintah mengarahkan pihak pendakwaan memberi kepada perayu salinan kenyataan tujuh orang saksi yang dinamakan yang direkodkan bawah s. 112 KTJ ('kenyataan polis' atau 'kenyataan saksi'). Hakim Mahkamah Tinggi menolak buatan perintah itu, memutuskan bahawa kenyataan polis tidak tertakluk pada pendedahan kerana kenyataan polis adalah dokumen yang mendapat perlindungan mutlak. Hakim selanjutnya memutuskan bahawa kenyataan-kenyataan tersebut hanya boleh diberi jika pihak pendakwaan mengetepikan perlindungan terhadap dokumen-dokumen tersebut. Hakim Mahkamah Tinggi mengambil kira bahawa tiada salah laksana keadilan kerana pihak pembelaan boleh menyoal saksi yang ditawarkan dan memutuskan sewajarnya sama ada hendak memanggil mereka sebagai saksi pembelaan. Terkilan dengan perintah itu, perayu memfailkan rayuan ini. Isu untuk pemutusan mahkamah dalam rayuan ini adalah sama ada pihak pendakwaan boleh diperintahkan, di akhir kes pendakwaan, dan apabila pembelaan dipanggil, untuk memberi kepada tertuduh sesalinan kenyataan saksi yang direkodkan bawah s. 112 KTJ oleh saksi-saksi yang ditawarkan kepada pembelaan, yang penting dan yang mungkin membantu kes pembelaan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Bawah s. 112(3) KTJ, seseorang yang memberi kenyataan polis 'terikat di sisi undang-undang untuk menyatakan kebenaran'. Jika kenyataan polis didapati palsu, pembuatnya boleh dituduh memberi keterangan palsu bawah Kanun Keseksaan dan pembuatnya tidak boleh menyatakan

bahawa percakapan antaranya dan pegawai polis dilindungi dan oleh itu, tidak boleh diterima sebagai keterangan. Selanjutnya, berikutan pindaan terhadap undang-undang berkaitan kebolehterimaan kenyataan polis, mahkamah boleh campur tangan dan memerintahkan pengemukaan kenyataan s. 112 untuk tujuan mencabar kebolehpercayaan saksi, seperti yang diperuntukkan bawah s. 113(2) KTJ. Satu kenyataan polis bawah s. 112 KTJ juga boleh diterima masuk sebagai keterangan dalam situasi-situasi lain seperti yang diperuntukkan dalam sub-ss. 113(3), (4) dan (5). Oleh sebab undang-undang statutori membenarkan kenyataan-kenyataan polis sedemikian diterima masuk sebagai keterangan dalam hal keadaan tertentu, kelihatan bahawa kenyataan polis yang sedemikian tidak pernah diniatkan sebagai dokumen yang dilindungi. Dengan penambahan s. 51A pada KTJ, pihak pendakwaan mempunyai kewajipan menyerahkan dokumen-dokumen tertentu kepada tertuduh sebelum perbicaraan bermula.

(2) Kebolehterimaan keterangan bukan sahaja tertakluk pada kaedah-kaedah kerelevanan, malah pada kaedah-kaedah pengecualian. Seorang saksi boleh ke mahkamah dan memohon perlindungan atas alasan ketidakpendedahan atau juga alasan polisi awam lain yang menjadikan pendedahan itu akan menjejaskan kepentingan awam. Oleh itu, walaupun tiada peruntukan statutori yang membenarkan pendedahan kenyataan polis, tiada juga peruntukan yang mengisytiharkan kenyataan polis sedemikian tidak boleh didedahkan. Selanjutnya, berdasarkan prinsip *common law* Inggeris, kecuali ada alasan-alasan baik untuk ketidakdedahan, pihak pendakwaan mempunyai kewajipan mendedahkan dan mengemukakan, daripada sumber yang tidak digunakan, kenyataan-kenyataan saksi kepada pihak pembelaan. Alasan baik untuk pendedahan termasuk tuntutan keimunan kepentingan awam oleh pihak pendakwaan atau risiko pendedahan tentang identiti pemberi maklumat.

(3) Kenyataan-kenyataan polis tidak boleh dianggap sebagai dilindungi menurut s. 32 Akta Keterangan 1950, iaitu dua perenggan terakhir (i) dan (j) diperkenalkan pada 1993. Walau bagaimanapun, tiada pertikaian sama ada perenggan-perenggan tersebut perlu dibaca secara bersekali atau berasingan. Perenggan (i) dan (j) jelas dan menerima hanya satu tafsiran. Jika niat Perundangan adalah agar kedua-dua perenggan dibaca bersekali, tidak perlu ada perenggan-perenggan berlainan. Oleh itu, jelas, niat Perundangan adalah agar perenggan-perenggan itu berbeza antara satu sama lain dan mesti dibaca secara berasingan.

(4) Mahkamah tidak bersetuju dengan kenyataan yang dinyatakan dalam *Husdi v. PP* ('*Husdi*') bahawa kenyataan-kenyataan polis mempunyai perlindungan mutlak. Kesimpulannya, *Husdi* tidak lagi boleh diikuti berkaitan dengan ini. Walau bagaimanapun, *Husdi* mungkin betul dalam keputusannya atas asas bahawa sebagai perkara melibatkan polisi awam, pihak pendakwaan tidak perlu memberikan kepada pembelaan kenyataan polis kerana terdapat bahaya sebenar gangguan terhadap saksi-saksi. Mungkin terdapat juga alasan-alasan lain. Dalam kes ini, hujahan tentang gangguan tidak bermerit kerana pihak pendakwaan telah menutup kesnya dan saksi-saksi yang kenyataan mereka dipohon telah ditawarkan kepada pembelaan. Sebaik sahaja saksi-saksi ditawarkan oleh pihak pendakwaan, mereka menjadi saksi-saksi pembelaan.

(5) Bawah s. 51 KTJ, peringkat di mana permohonan untuk pendedahan dibuat adalah amat penting. Jika permohonan dibuat sebelum perbicaraan bermula, pendedahan terhad pada perkara-perkara yang dinyatakan dalam pertuduhan. Apa-apa yang lebih daripada itu akan bermaksud pembelaan memeriksa keterangan pendakwaan sebelum perbicaraan. Pendedahan sebelum perbicaraan dalam kes jenayah tidak boleh disamakan dengan penzahiran dan pemeriksaan dokumen-dokumen sebelum perbicaraan dalam prosiding sivil. Dalam pelaksanaan budi bicara bawah s. 51 KTJ, mahkamah perlu mempertimbangkan keadilan kes. Permohonan ini dibuat di akhir kes pendakwaan selepas pembelaan dipanggil dan saksi-saksi ditawarkan kepada pembelaan. Berdasarkan apa-apa yang didedahkan tentang peranan saksi-saksi dan kerelevanan keterangan mereka, kenyataan polis jelas diperlukan dan penting untuk pembelaan meneruskan kes mereka.

(6) Tanggungjawab utama untuk memastikan perbicaraan adil terletak pada mahkamah. Dalam konteks ini, dan dalam konteks rayuan ini, imbangan perlu dibuat antara pendedahan pendakwaan yang mencukupi dan kepentingan awam tentang pengesanan dan hukuman untuk jenayah. Proses perbicaraan tidak boleh dijejaskan oleh pendedahan yang tidak perlu. Tetapi, jika tuntutan perbicaraan adil memerlukannya, mahkamah tidak akan ragu-ragu membangkitkan bidang kuasa sedia ada untuk menghalang ketidakadilan atau salah laksana keadilan atau penyalahgunaan proses. Pendedahan seperti dalam kes ini sebenarnya adalah demi kepentingan pihak pendakwaan. Jika semasa rayuan didapati kegagalan pendedahan adalah ketidakaturan penting yang menjurus pada salah laksana keadilan, mahkamah terikat untuk mengetepikan apa-apa sabitan sedemikian kerana tidak selamat. Akhirnya, pihak pendakwaan mungkin tidak mendapat peluang kedua untuk perbicaraan semula.

(7) Apabila tuntutan untuk imuniti kepentingan awam dinyatakan, mahkamah dapat mengelak daripada menghadapi kepentingan awam bersaingan yang berkenaan dengan pendedahan. Satu bahagian ialah kepentingan awam menghalang kemudaratan pada negara dan perkhidmatan awam dengan pendedahan dokumen-dokumen tersebut. Satu bahagian lagi ialah kepentingan awam untuk mempromosikan pentadbiran keadilan dengan adil dan efektif dan kemudaratan akan berlaku jika penahanan keterangan penting menyebabkan mahkamah tidak berupaya membuat keputusan adil untuk pertikaian tersebut.

(8) Pihak pendakwaan bertanggungjawab mendedahkan kepada pihak pembelaan kenyataan polis saksi-saksi yang ditawarkan kepada pembelaan yang perlu dan penting untuk kes mereka. Walaupun tiada tanggungjawab dari segi statutori untuk berbuat demikian, sememangnya terdapat tanggungjawab itu dalam *common law*. Salah laksana keadilan tentu akan berlaku jika kenyataan polis, khususnya daripada orang yang telah meninggal dunia dan yang lain-lain yang tidak boleh dibawa ke mahkamah sebagai saksi, tidak dikemukakan kepada pihak pembelaan. Mahkamah tidak wajar mengganggu apa-apa keputusan yang dibuat dalam pelaksanaan budi bicara hakim. Walau bagaimanapun, budi bicara tersebut dilaksanakan atas salah faham undang-undang yang mengakibatkan salah laksana undang-undang. Oleh itu, campur tangan mahkamah rayuan adalah wajar untuk menghalang salah laksana keadilan dan memastikan perbicaraan adil.

Case(s) referred to:

BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***
Conway v. Rimmer and Another [1968] 1 All ER 874 ***(refd)***
D v. National Society for the Prevention of Cruelty to Children [1978] AC 171 ***(refd)***
Dallison v. Caffery [1964] 2 All ER 610 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dawkins v. Lord Rokeby (1875) LR HL 744 ***(refd)***
Ernst & Young v. SJ Asset Management Sdn Bhd & Anor [2018] MYCA 473 ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(dist)***
Husdi v. PP [1980] 1 LNS 29 FC ***(dist)***
Huzir Hassan v. Ketua Polis Daerah, Johor Bahru [1994] 2 CLJ 771 HC ***(refd)***
In Re Loh Kah Kheng [1990] 1 CLJ 823; [1990] 2 CLJ (Rep) 156 HC ***(refd)***
Kobra Taba Seidali v. PP [2014] 2 CLJ 12 CA ***(refd)***
Mahabirji Birajman Mandir v. Prem Narain Shukla and Ors [1965] Cri LJ 452 ***(refd)***
Martin Rhienus v. Sher Singh [1949] 1 LNS 49 HC ***(refd)***
Methuram Dass v. Jagannath Dass ILR 28 Cal 794 ***(dist)***
Muhammad Kadar v. PP [2011] 3 SLR 1205 ***(refd)***
Natha Apparao v. Narulasetti Suryaprakasa Rao AIR 1951 Mad 864 ***(refd)***
Pinner v. Everett [1969] 1 WLR 1266 ***(refd)***
PP v. Asnawi Yusuf [2012] 3 CLJ 41 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***

PP v. Michael Anayo Akabogu [1995] 4 CLJ 79 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1993] 1 LNS 95 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
Pragalathan Balakrishnan v. PP [2018] 2 CLJ 420 CA ***(refd)***
R v. Brown (Winston) [1998] AC 367 ***(refd)***
R v. Bryant & Dickson [1946] 31 Cr App R 146 ***(refd)***
R v. Keane [1994] 1 WLR 746 ***(refd)***
R v. Lawson [1990] 90 Cr App R 107 ***(refd)***
R v. Mcllkenny and others [1992] 2 All ER 417 ***(refd)***
R v. Stinchcombe [1991] 3 SCR 326 ***(refd)***
R v. Ward [1993] 2 All ER 577 ***(refd)***
State of Orissa v. Debendra Nath Padhi [2004] 4 LRI 860 ***(refd)***
State of Uttar Pradesh v. Raj Narain [1975] AIR 865 ***(refd)***
Stock v. Frank Jones (Tipton) Ltd [1978] 1 All ER 948 ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
The Public Prosecutor v. Pocku Syed Ismail [1973] Cri LJ 931 ***(refd)***
Yeo Tse Soon & Anor v. PP [1995] 2 CLJ 179 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51, 51A, 112(3), 113(1), (2), (3), (4), (5)
Evidence Act 1950, ss. 32(1)(i), 122, 123, 124, 126, 127, 128, 129
Penal Code, s. 302
Securities Commission Malaysia Act 1993, s. 134

Indian Evidence Act 1872 [Ind], s. 124
The Code of Criminal Procedure 1973 [Ind], s. 91

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For the respondent - Mohd Dusuki Mokhtar & Muhamad Iskandar Ahmad; DPPs

[Editor's note: For the High Court judgment, please see Siti Aisyah v. PP [2019] 2 CLJ 515 (overruled).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal, from the Shah Alam High Court, concerns a narrow point, that is, whether the prosecution can be ordered, at the end of the case for the prosecution, and where defence has been called, to furnish to the accused a copy of witness statements recorded under s. 112 of the Criminal Procedure Code ("CPC") of witnesses offered to the defence which are material and which may assist the defence case.

[2] In the High Court, an application was made under s. 51 of the CPC for the production of seven witness statements recorded under s. 112 of the CPC. These witnesses were not called by the prosecution but offered to the defence. The application was resisted by the prosecution. On 18 December 2018, the application was dismissed by the High Court.

[3] Aggrieved with this order, the appellant filed this appeal. The appeal was heard on 24 January 2019. At the conclusion of the submissions, we unanimously allowed the appeal. We considered that the appellant was entitled to the witness statements sought. We set aside the order of the High Court and ordered production of the witness statements. Our reasons for doing so now follow and will form the judgment of the court.

At The High Court

[4] The appellant faced a charge of murder under s. 302 of the Penal Code in the High Court. The prosecution had completed its case and the court concluded that a *prima facie* case had been established. The appellant was ordered to enter her defence on the charge. The prosecution offered 93 witnesses to the defence. The appellant then applied under s. 51 of the CPC for an order to direct the prosecution to provide to the applicant (appellant) copies of statements of seven named witnesses recorded under s. 112 of the CPC (for convenience referred to as "police statements" or "witness statements" interchangeably").

[5] After hearing submissions, the learned judge declined to make the order. Citing the law set out in the cases of *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1, *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312, *Martin Rhienus v. Sher Singh* [1949] 1 LNS 49; [1949] MLJ 201, *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 ("*Husdi v. PP*") and *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80, the learned judge came to the view that the police statements were not subject to disclosure as they were absolutely privileged documents.

[6] The learned judge further held that the statements could only be supplied if the prosecution had waived the privilege over the documents. His Lordship considered that there was no miscarriage of justice as the defence could interview the witnesses offered and decide accordingly whether to call them as defence witnesses.

Our Decision

[7] Before us, learned counsel for the appellant argued that the police statements are not privileged documents. It was contended that the decision in *Husdi v. PP, supra*, ("*Husdi*") which enunciated the proposition that such statements were absolutely privileged ought not to be followed as the law since then has moved on in other common law jurisdictions.

[8] The appellant further submitted that the dual requirement under s. 51 of the CPC of necessity and desirability had been fulfilled and therefore the police statements ought to be made available in the interests of a fair trial.

The respondent, on the other hand, echoed what was held by the learned judge and maintained firmly their position that it had always been the policy of the Public Prosecutor to never provide the police statements even for witnesses offered after the prosecution had closed their case.

[9] Now, these issues had been considered by the learned judge who held that because of the status of the statements being absolutely privileged, their disclosure can never be ordered at any stage of the proceedings. For good measure, the learned judge opined that the police statements cannot be considered to be unused material even after the close of the case for the prosecution where witnesses were offered to the defence.

Whether The Police Statements Are Privileged

[10] With that being the case, a pivotal issue in this appeal is whether the learned judge was right to consider such statements as being absolutely privileged. As alluded to at the outset, the learned judge in coming to his conclusion relied almost exclusively on *Husdi*.

[11] However, even a cursory perusal of the judgment of *Husdi* showed that, unlike the instant application, the police statements in that case were sought prior to the commencement of the trial. It was there held by Syed Othman FJ (sitting in the High Court) that police statements were a requirement of written law in the form of s. 112 of the CPC. However, there was no provision in the CPC and the Evidence Act 1950 that provided a right to inspect a police statement.

[12] The finding that police statements are absolutely privileged was based on the Indian decision in *Methuram Dass v. Jagannath Dass* ILR 28 Cal 794 ("*Methuram Dass*") and the former Court of Appeal decision, *Martin Rhienus v. Sher Singh* (*supra*) ("*Martin Rhienus*") which had merely followed the same Indian decision without any independent reasoning. In effect, the finding of privilege flowed from the one case of *Methuram Dass*.

[13] We must hasten to observe that *Methuram Dass* (and also *Martin Rhienus*) was not a case about disclosure of police statements in a criminal trial. It was a claim for damages for defamation in respect of a statement made in a police investigation. It is easy to accept that statements made in a police investigation are made on an occasion of privilege thus providing a defence to a defamation action. But whether they then become privileged documents not subject to disclosure is quite another matter.

[14] In the context of what privilege means, it is instructive to refer to the House of Lord's decision in *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 ("*NSPCC*"). It was a case concerning disclosure of the identity of informants. Lord Denning MR observed:

> Much of the discussion before us was about 'privilege'. When the word 'privilege' is used in law, it is used in a somewhat special sense. It is used

A to denote a privilege or right to keep things secret – to keep things back from your opponent or from the court – so that they cannot get to know of them: and thereby be hindered in the trial of the case.

I do not regard the N.S.P.C.C. as claiming any privilege in that sense. They do not claim any privilege or right to keep back the information. B They say that they may have a duty not to disclose it. They have a duty to preserve the confidence with which they have been entrusted. The question is not one of privilege, but of their duty. How far should the court go to compel them to break their confidence?

To my mind, it is all a question of balancing the competing interests. C 'Confidentiality' as Lord Cross of Chelsea said in *Crompton (Alfred) Amusement Machines Ltd v. Customs and Excise Comrs (No. 2)* [1974] AC 405, at p 433, 'it is not a separate head of privilege'. But it is a very material consideration when deciding whether to compel disclosure. In holding the scales of justice, the courts should not allow confidences to be lightly broken. When information has been imparted in confidence, and D particularly where there is a pledge to keep it confidential, the courts should respect that confidence. They should in no way compel a breach of it, save where the public interest demands it, and then only to the extent that the public interest requires.

[15] Nevertheless, Syed Othman FJ in *Husdi* went on to draw a parallel E between privilege for actions in defamation and prohibition against disclosure in a criminal trial. This was how he put it (at p. 307):

These two cases involve actions for defamation. But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is F undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witness.

[16] Even so, as noted by Syed Othman FJ, unlike the Malaysian provision, there was no provision in the Indian Criminal Procedure Code which imposed a legal obligation on the person giving a police statement to G state the truth. His Lordship observed at p. 307:

In India, the law relating to the powers of the police in investigation is about the same as ours. But it should be noted that in the Indian Criminal Procedure Code there is no provision equivalent to our section 112(iii) which in effect says that a person making a police statement shall be H legally bound to state the truth. *Sohoni's The Code of Criminal Procedure* (16th Edition) Volume 1, at page 796 reads:

'A refusal to answer questions asked by a police officer under this section' (section 161) 'is not punishable under section 176, section 179 or section 187, I.P.C. as under the present Code' (1898) 'there I is no obligation to speak the truth as there was under the 1882 Code'.

[17] Indeed, Syed Othman FJ had expressed some reservations about the correctness of the observation made in *Methuram Dass* as noted at p. 307:

> What should be noted in the above passage is that part of the first sentence which says that the investigation was required by law, ie, written law. This covers the act of recording a police statement. But it should be observed that the statement that it was punishable if a person making a police statement answered untruly, appears to be in conflict with the provisions of the Indian Criminal Procedure Code in force at the time. This case was decided in 1901, when under the 1898 Indian Code there is no obligation to speak the truth to the police as indicated by Sohoni and cited above.

[18] It would therefore appear to us that, in the absence of a legal obligation to state the truth, it may be justified for the Indian courts to hold that a police statement is privileged in that a person cannot use a police statement made by another to sue for defamation or that a person cannot be charged for giving a false police statement because there is no obligation to state the truth in the first place under the Indian CPC. It could be said that a statement made in the course of police investigation is absolutely privileged because public policy (at that time) demanded that no action should be taken against a witness who came forward and gave a statement to the police (see *Dawkins v. Lord Rokeby* (1875) LR HL 744).

[19] However, as acknowledged by Syed Othman FJ in *Husdi*, the Malaysian s. 112 of the CPC is different from its Indian counterpart. Under s. 112(3) of the CPC, the person giving a police statement "shall be legally bound to state the truth". If the police statement is found to be false, its maker can be charged for giving false evidence under the Penal Code and its maker cannot claim that the communication between him and the police officer is privileged and therefore not admissible in evidence.

[20] Be that as it may, the law in relation to admissibility of police statements was amended in 2007 through two Amendment Acts (Act A1274 and Act A1304) where s. 113 of the CPC was substituted with a completely new provision. By this amendment, the court can intervene and order production of s. 112 CPC statements for the purposes of challenging and impeaching the credit of witnesses as provided in s. 113(2) of the CPC. A police statement under s. 112 of the CPC can also be admitted in evidence in other situations as provided in sub-ss. 113(3), (4) and (5). Since statutory law allows such police statements to be admitted in evidence in certain circumstances, it seems to us that such police statements were never intended to be privileged documents.

[21] Even then, it must be observed that admissibility of evidence is not only subject to rules of relevancy but also to the rules of exclusion. Leaving aside rules relating to hearsay and opinion evidence, a witness can come to court and claim privilege as a ground for non-disclosure or even some ground of public policy where disclosure would be detrimental to the public interest (see *State of Uttar Pradesh v. Raj Narain* [1975] AIR 865).

[22] So, even though some evidence may be highly relevant or even crucial to the final outcome of the case, it can be rejected by the rules of exclusion such as privilege. Having said that, although we accept that there are no statutory provisions which allow for disclosure of police statements, there are also no provisions which declare that such police statements shall not be disclosed. Section 113(1) of the CPC merely states that such statements shall not be used in evidence. This is quite different from disclosure as the accused, by virtue of the amendments in 2007, now has the right to admit his own police statement in support of his defence as provided in s. 113(3) of the CPC.

[23] The Legislature has not seen fit to declare such statements as privileged as it has done, for example, for documents evidencing affairs of State (s. 123 of the Evidence Act 1950), for official communications (s. 124 Evidence Act 1950), communications during marriage or marital privilege (s. 122 of the Evidence Act 1950) and professional communications between an advocate and his client or legal professional privilege as found in ss. 126 to 129 of the Evidence Act 1950. These provisions prevent the relevant parties from being compelled to disclose such communications to anyone including the court except as provided.

[24] Now, Syed Othman FJ in *Husdi*, in coming to his finding that the police statements ought not to be disclosed, also referred to the common law of England as well as India. His Lordship was certainly entitled to do so by virtue of s. 5 of the CPC which reads:

> **Laws of England, when applicable**
>
> 5. As regards matters of criminal procedure for which no special provision has been made by this Code or by other law for the time being in force relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

[25] Even so, the learned judge in the instant case declined to resort to the current law in England as he considered that there was no lacuna in the Code on this issue. With respect, we do not think he was right as the requirement under s. 5 of the CPC is two-fold. The first is that there must not be any statutory provision in the CPC or other law. The second is that the law in England must not be in conflict or be inconsistent with the CPC.

[26] In our view, the principles relating to criminal procedure in England and especially in relation to the duty by the prosecution to disclose police statements are certainly relevant under s. 5 of the CPC. If Syed Othman FJ in *Husdi* had seen fit to consider the case law in England and India for guidance, it is at least curious as to why the learned judge in the present case refused to do so.

[27] As it turns out, the law in respect of prosecutorial disclosure in England has developed significantly. The Malaysian courts, however, have been stuck in time and have not traversed beyond *R v. Bryant & Dickson* [1946] 31 Cr App R 146 ("*Bryant & Dickson*") where it was held that where the prosecution has taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under a further duty of supplying the defence with a copy of the statement which they have taken.

[28] Surprisingly, even before *Husdi* was decided, there was the *dicta* of Lord Denning MR in *Dallison v. Caffery* [1964] 2 All ER 610 ("*Dallison*") where it was observed (at p 618):

> The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor (for the Prosecution), immediately after the court proceedings, gave the solicitor for the defence the statement of Mr and Mrs Stamp; and thereby he did his duty.

[29] In *R v. Lawson* [1990] 90 Cr App R 107, Parker LJ noted the contradictions between *Bryant & Dickson* and *Dallison* but approved of the commentary in *Archbold* (43rd edn) which stated:

> Certain prosecuting authorities and prosecutors not infrequently use this authority as a justification for never supplying the defence with the statement in such circumstances. It should be borne in mind, however, that an inflexible approach to these circumstances can work injustice. For example, the witness' memory may have faded when the defence eventually seek to interview him. Or he may refuse to make any further statement. The better practice is to allow the defence to see such statements unless there is good reason for not doing so.

[30] More recently, the United Kingdom Court of Appeal in *R v. Ward* [1993] 2 All ER 577, after reciting the duty of the prosecution to make available to the defence witnesses whom the prosecution has decided not to call, summarised the position in the following terms (at p. 632):

> Unless there are good reasons for not doing so, the duty should normally be performed by supplying copies of the witness statements to the defence or allowing them to inspect statements and make copies: see *R v. Lawson*. Where there are good reasons for not supplying copies of the statements, the duty to disclose can be performed by supplying the name and address of the witness to the defence.

[31] Finally, in *R v. Brown (Winston)* [1998] AC 367, the House of Lords had to contend with the issue of whether the prosecution (Crown) was under a legal duty to disclose material which was relevant only to the credibility of defence witnesses. After providing an overview of the English common law in relation to prosecutorial disclosure, Lord Hope expressed the prevailing law as follows (at p 377):

> But the common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed …

[32] Undoubtedly, from the cases cited above, judicial attitudes to disclosure in England have changed. For the purposes of this appeal, it is at least clear, from the English common law principles distilled from the foregoing key authorities, that unless there are good reasons for non-disclosure, the prosecution has a duty to disclose and provide, from the unused material, witness statements to the defence.

[33] Good reasons for non-disclosure may include the claim of public interest immunity by the prosecution or risk of disclosure of the identity of informers. Even then, as decided in *R v. Keane* [1994] 1 WLR 746; "If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it …" (per Lord Taylor at p. 751).

[34] For completeness, we should also add the policy of prosecutorial disclosure in England has now been codified with the enactment of the Criminal Procedure and Investigations Act 1996 ("CPIA 1996") where there exists now a continuing duty to disclose materials as the trial progresses. For this purpose, an impartial disclosure officer is tasked to ensure fair and effective disclosure.

[35] As a result of criticisms after cases such as *R v. Mcllkenny and others* [1992] 2 All ER 417 and others, this new scheme of disclosure now acts as a bulwark against possible miscarriages of justice due to nondisclosure. Nevertheless, this should not detract from the considerable jurisprudential development in the English common law in this area prior to the introduction of CPIA 1996 which is relevant to this case.

[36] In the same context, we note that underpinning the approach to prosecutorial disclosure in the English common law is perhaps the appreciation that the adversarial system has its disadvantages in that there may be an inequality of arms or resources which must somehow be ameliorated by imposing an obligation on the prosecution to disclose and provide material helpful to the defence. Illustrative of this approach is the Supreme Court of Canada decision in *R v. Stinchcombe* [1991] 3 SCR 326 where it was recognised that "…the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done" (per Sopinka J at p. 333).

[37] On a more philosophical note, it is perhaps the nature of the adversarial system which promotes this combative stance amongst prosecutors who obviously want to play hard to win and in the process, at times, fair play obligations are ignored. To be fair though, disclosure is really the antithesis to the adversarial tradition and culture and which, by the way, has long been fostered in advocacy training. Since the adversarial spirit is resilient and challenging to keep in check, perhaps legislative intervention, as has been the case in England, has become necessary to provide the balance.

[38] In the Malaysian context, the addition to the CPC of s. 51A has levelled the battlefield somewhat as appreciated by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312 ("*Anwar Ibrahim*"). The prosecution now has a duty to deliver certain documents to the accused prior to the commencement of the trial. Although s. 51A has no direct relevance to the present appeal, it is at least clear evidence of the change in the approach to disclosure.

[39] There appears now to be a greater appreciation of the right of an accused to a fair trial which must encompass the right to adequate disclosure of the case against him and of material favourable to him. It was not too long ago that the only material provided to the accused was the charge sheet, the

first information report and the police statement of the accused. The experience of advocates then involved in criminal law, and even prosecutors, was of a trial in the dark or trial by ambush which may have been inimical to justice.

[40] Judicial attitudes towards more prosecutorial disclosure has also undergone similar change in most common law jurisdictions. The Singapore Court of Appeal in *Muhammad bin Kadar v. PP* [2011] 3 SLR 1205 after exploring common law principles on prosecutorial disclosure in England, Australia, Hong Kong, Canada, India, Malaysia and Brunei held that there was indeed a common law duty on the prosecution to disclose unused material in Singapore.

[41] In delivering the judgment of the court, VK Rajah JA characterised the scope of the duty as follows (at p. 1269):

> 113. In our view, it is not necessary, for present purposes, for us to attempt a comprehensive statement of what the law of Singapore should be in this area. There is still ample scope for the development of the fine details in subsequent cases or by legislative intervention. It suffices for us to say that we agree with the Prosecution that the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case. However, the Prosecution must disclose to the Defence material which takes the form of:
>
> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

[42] In Brunei, the leading case on point is the Court of Appeal decision in *Yeo Tse Soon & Anor v. PP* [1995] 2 CLJ 179; [1995] 3 MLJ 255. The trial judge had rejected the appellant's application for the prosecution to produce a statement made by one Lau Foo Tze ("Lau") to the police on the ground that it was open to the defence to call him as a defence witness. The appellant believed that this Lau's statement contained material which could exonerate him. The statement became necessary as Lau had disappeared by the time the trial had commenced and could not be traced.

[43] On appeal, the Brunei Court of Appeal, after analysing the common law, adopted the approach in the United Kingdom that only if there are good reasons for withholding a statement should the prosecution refuse to disclose it and make it available. The court held that a material irregularity had occurred through a wrong exercise by the judge of this discretion in refusing to order production.

[44] It is significant to note that in none of the cases in the common law jurisdictions that were cited to us was there any reference to police statements being absolutely privileged and therefore immune to disclosure. Even in Malaysia, the only authority for this proposition is that of *Husdi*. The learned judge's observation in the instant case that he was bound by the Federal Court decision in *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80 is misconceived in that nowhere in that decision was the Federal Court invited to consider whether Syed Othman FJ's finding that police statements are absolutely privileged was correct. In fact, Suffian LP, who delivered the judgment of the Federal Court, had expressly observed in the last paragraph of the judgment that the case before Syed Othman FJ concerned a different question which was not challenged before them in the Federal Court.

[45] It is worth noting that even the Federal Court in *Anwar Ibrahim, supra*, did not consider *Husdi* at all. In that case, an application was made prior to the commencement of trial under s. 51 of the CPC for an order to compel the prosecution to produce a host of documents and materials including witness statements recorded under s. 112 of the CPC. The matter was decided by the Federal Court purely on the consideration of the scope of s. 51 of the CPC and the Supreme Court decision in *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436 ("*Raymond Chia*").

[46] Apart from the foregoing, there is perhaps another reason why police statements are not to be considered as privileged. It has to do with s. 32 of the Evidence Act 1950. Section 32, shorn of the illustrations, is set out as follows:

> 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of proceeding in which the cause of his death comes into question;

A

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

B

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

C

(d) when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed he would have been likely to be aware and when the statement was made before any controversy as to the right, custom or matter had arisen;

D

(e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

E

(f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when the statement was made before the question in dispute was raised;

F

G

(g) when the statement is contained in any document which relates to any transaction as is mentioned in paragraph 13(a);

H

(h) when the statement was made by a number of persons and expressed feelings or impressions on their part relevant to the matter in question;

(i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and

I

(j) where the statement was made by a public officer in the discharge of his duties.

[47] The last two paras. (i) and (j) were only introduced in 1993 by the Evidence (Amendment) Act 1993 (Act A851) with effect from 16 July 1993 as noted in *PP v. Mohd Jamil Yahya & Anor* [1993] 1 LNS 95; [1993] 3 MLJ 702 at p. 706 ("*Mohd Jamil*"). So, the initial eight exceptions to the hearsay rule were now increased to ten with the new paras. (i) and (j). There is, however, some dispute as to whether para. (i) has to be read conjunctively or disjunctively with para. (j) (see *PP v. Michael Anayo Akabogu* [1995] 4 CLJ 79; [1995] 3 MLJ 42; *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747; [1996] 5 MLJ 405).

[48] It is an elementary rule of statutory construction that any word or phrase in a statute must be interpreted according to their natural and ordinary meaning unless that meaning gives rise to an absurdity, injustice or contradiction which could not reasonably have been the intention of the Legislature. In such a case, the meaning can be modified or some other meaning can be adopted (see *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 and *Pinner v. Everett* [1969] 1 WLR 1266).

[49] In our view, the provisions of paras (i) and (j) are plain and admit to only one interpretation. If the intention was to read both paragraphs conjunctively, then it would have been unnecessary to have a separate para. (j). The draftsman could have easily combined the contents of both in one paragraph. So clearly, the intention was for the paragraphs to be independent of each other and to be read disjunctively.

[50] So, for example in *Mohd Jamil, supra*, the s. 112 of the CPC statement of a deceased person who was a self-confessed trafficker in cannabis was admitted into evidence under s. 32(1)(i) of the Evidence Act 1950. Interestingly though, the court did not place much reliance on the said statement as it was made by someone who was deemed not to be worthy of credit.

[51] With that being the position, it can hardly be disputed that police statements can be admitted under both paras. (i) and (j) although para. (j) will apply only to a statement made by a public officer which may not be relevant to the present case. So, provided the police statements fall within the four categories of persons mentioned in s. 32(1) of the Evidence Act 1950, such statements will be rendered admissible. In our view, this clearly negates the proposition that such police statements are privileged as statutory law now deems them to be potentially admissible in evidence.

[52] In the instant case, we noted, as did the learned judge, that of the seven witness statements sought, one of the witnesses is now deceased whilst four others cannot be produced. If these witnesses are unavailable to provide their testimonies, the defence may be able to avail themselves of the exceptions as to the hearsay rule under s. 32 of the Evidence Act 1950. It will be a miscarriage of justice if it turns out that the contents of the witness statements of the missing witnesses can exonerate the appellant or at least cast a doubt on the case for the prosecution.

[53] On this score as well, this court in *PP v. Asnawi Yusuf* [2012] 3 CLJ 41 held that when witnesses were offered to the prosecution by the defence, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution failed to fulfil that obligation, the accused must be acquitted. The court observed (at p. 49):

> [22] Learned defence counsel gave ample warning to alert the court and especially to the learned deputy public prosecutor that it was his intention to call those witnesses including but not limited to M Dahlan, Edy Shahputra and Abdul Rahman.
>
> [23] Now, perhaps curiously, when learned defence counsel wanted the above named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We have provisions in our laws to ensure that this would not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

[54] In *Pragalathan Balakrishnan v. PP* [2018] 2 CLJ 420, this court also noted that if the prosecution had told the trial judge that a particular witness offered to the defence cannot now be located, the prosecution could have at least provided the s. 112 CPC statement to the defence so that they could then have some opportunity to deal with it or even introduce it into evidence if the law permitted it.

[55] In this context as well, this court in *Kobra Taba Seidali v. PP* [2014] 2 CLJ 12 had occasion to hold that failure of the prosecution to produce the witness or hand over a copy of the witness statement to the defence to be used by the defence at the defence stage was fatal on the factual matrix of that case.

[56] For all the foregoing reasons, we did not agree with the proposition, as advanced in *Husdi*, that police statements are absolutely privileged. In the upshot, *Husdi* should no longer be followed in this respect. However, *Husdi* may have been correct in its eventual outcome on the basis, as alluded to by Syed Othman FJ, that as a matter of public policy, it was undesirable for the prosecution to supply the defence with police statements as there is a real danger of tampering with the witnesses. There are perhaps other reasons as well but since the issue of supplying witness statements before trial is not the issue before us, we need to say no more on the subject.

[57] We must also hasten to add, lest it be misunderstood, that the issue of tampering can only arise if such statements are provided prior to the commencement of the trial which was the case in *Husdi*. In the instant case, however, the contention of tampering is without merit as the prosecution has

closed its case and the witnesses of whom the statements are sought are now offered to the defence. Once witnesses are offered by the prosecution, they become defence witnesses. It is hard to imagine tampering with your own witness.

[58] Now, the learned judge was of the view that tampering could still occur such as "using any type of physical force to keep a witness from testifying, or persuading a witness to change their testimony, and blackmailing or bribing a witness …" With respect, this argument is tenuous as it overlooks the fact that if the witness provides testimony which is materially at variance with his statement to the police, the prosecution would be quick to impeach his or her credit. So no advantage is gained anyway.

[59] To muddy the waters further, one of the witnesses in the instant case is now deceased and four others have gone missing. So, the assertion of tampering in respect of these witnesses, with respect, is rather duplicitous. In fact, when asked by the court to explain how it was possible for tampering to occur, the learned DPP was hard-pressed to give us even one example.

Whether The Production Of The Police Statements Are Necessary And Desirable

[60] The next question for us to consider was whether the appellant had fulfilled the dual requirements of necessity and desirability under s. 51 of the CPC. Section 51 of the CPC states:

> **Summons to produce document or other things**
>
> 51(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

[61] To this end, the appellant argued that it is necessary and desirable for the prosecution to produce the s. 112 statements applied for by the appellant as they are relevant to the issues for adjudication by the High Court. To substantiate this argument, the roles played by the respective witnesses

whose s. 112 statements are now the subject of this application were raised by counsel for the appellant during the prosecution case, in particular, during the cross-examination of the investigating officer (SP9).

[62] Before us, the roles of each of these witnesses, as raised during the trial, was outlined as follows:

(i) Ahmad Fuad bin Ramli: He was a personal driver assigned by one Tomie Yoshio to fetch the deceased in the instant case, Kim Chol/Kim Jong Nam, whenever the deceased came to Malaysia for a period of six months because Kim Jong Nam felt that his life was in danger.

(ii) Lim Cheng Gam: He was the personal driver assigned to fetch the deceased to KLIA 2 on the fateful day (13 February 2017). He has since passed away.

(iii) Tomie Yoshio: He was an acquaintance of the deceased. The deceased had complained to him six months before the fateful day that "my life is in danger" and "I am scared of my life and I want a driver". Subsequently, he assigned Ahmad Fuad bin Ramli to fetch the deceased whenever he came to Malaysia.

(iv) Ng Wai Hoong: He worked in Ningo Spa, Flamingo Hotel and can confirm the appellant went back to work in Ningo Spa on the fateful day until she was arrested by the police on 16 February 2017. The evidence is relevant to show conduct of the appellant immediately after the incident.

(v) Dessy Meyrisinta: She was one of the two roommates of the appellant in Room No. 356, Flamingo Hotel whom the appellant alleged was present in the same room when the appellant was arrested by the police. She can throw light with regard to an incriminating exhibit that was removed from the room.

(vi) Raisa Rinda Salma: She was one of the two roommates of the appellant in Room No. 356, Flamingo Hotel whom the appellant alleged was present in the same room when the appellant was arrested by the police. She can also throw light with regard to the recovery of an incriminating exhibit that was recovered from the room.

(vii) Kamaruddin bin Masiod: He introduced the appellant to one Ri Ji U (James) in January 2017 for an actress role in a prank show and could shed light on how the appellant was subsequently introduced to the North Koreans.

[63] The jurisprudence in relation to s. 51 of the CPC is not controversial. Apart from satisfying the dual requirements of necessity and desirability as provided under s. 51 itself, the stage at which the application for disclosure is made is of primary importance. If the application is made before the

commencement of the trial, the disclosure is limited to matters as stated in the charge. Anything more would be tantamount to the defence having inspection of the evidence of the prosecution prior to trial. Pre-trial disclosure in criminal cases cannot be equated to the pre-trial discovery and inspection of documents in a civil proceeding. In exercising the discretion under s. 51 of the CPC, the court must have regard to the justice of the case (see *Raymond Chia, supra* and *Anwar Ibrahim, supra*).

[64] What was of interest to the present appeal was the stage at which the application for disclosure was made. In the instant case, the application was made at the end of the case for the prosecution after defence had been called and witnesses offered to the defence. On this question, the Federal Court in *Anwar Ibrahim, supra* approved of what was held in the Indian case of *State of Orissa v. Debendra Nath Padhi* [2004] 4 LRI 860. On the issue of the scope of the Indian s. 91 Code of Criminal Procedure 1973 (equivalent to our s. 51 CPC) the court observed:

> In so far as the accused is concerned, his entitlement to seek order under s. 91 would ordinarily not come till the stage of the defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or the accused.

[65] It is unfortunate that in the instant case, the learned judge did not consider whether the requirements of necessity and desirability have been established. In our view, based on what was disclosed as to the role of the witnesses and the relevance of their evidence, the police statements are certainly necessary and desirable for the defence to advance their case.

[66] It is axiomatic that the appellant ought to be given every opportunity to substantiate her defence in the interests of a fair trial. To this end, the court must have the benefit of all relevant evidence which reflects on the guilt or innocence of an accused. The appellant, for this purpose, should not be deprived of the opportunity to secure the police statements and to determine if the statements could be used as evidence under s. 32 of the Evidence Act 1950.

[67] As adverted to earlier, the prosecution must not knowingly withhold unused material that may undermine its case or strengthen the defence case. The fruits of investigation are not its own property but the property of the public to be used to ensure that justice is done (*R v. Stinchcombe, supra*). The duty of the prosecution then is to assist the court in arriving at a just outcome based on all the available evidence.

[68] Simply put, the duty of the prosecution is to act fairly. They are certainly not obliged to lead evidence which may undermine their case, but fairness requires the unused material in its possession, which may undermine

its case, or be helpful to its adversary, be disclosed to the defence. The duty as a prosecutor should never be one bent on securing a conviction at all costs thus risking injustice.

[69] In the end, the paramount duty of ensuring a fair trial falls on the court. In this context, and in the context of this appeal, a balance has to be struck between adequate prosecutorial disclosure and the public interest of the detection and punishment of crime. The process of the trial must not be undermined by unnecessary disclosure. But if the demands of a fair trial so require, the court will not hesitate to invoke its inherent jurisdiction to prevent injustice or miscarriage of justice or abuse of process.

[70] We should also add that disclosure as in the present case is actually in the interest of the prosecution. If it turns out on appeal that the failure to disclose was a material irregularity that had occasioned a miscarriage of justice, the court will be duty-bound to set aside any such conviction for being unsafe. In the end, the prosecution may not get a second chance of securing a retrial.

Disclosure Not In The Public Interest

[71] Now, in a last throw of the dice, the learned Deputy Public Prosecutor ("DPP") submitted that the statements in question ought not to be disclosed as it was against the public interest. It was unclear exactly the position that was being taken. No affidavit had been filed to advance this proposition. If what was being asserted was a claim for public interest immunity, it should have been raised in the High Court. In any event, the learned DPP was unable to explain how such a claim can arise.

[72] In any case, we were conscious that where a claim of public interest immunity is asserted, it is inevitable that the court will be faced with competing public interests where disclosure is concerned. On the one hand is the public interest of preventing harm to the nation and the public service by such disclosure of documents. On the other hand is the public interest of promoting the fair and effective administration of justice where harm would be caused if the withholding of material evidence results in the court being unable to make a fair determination of the dispute.

[73] In the context of injury to public interest, in what came to be the leading case on the subject, the House of Lords in *Conway v. Rimmer and Another* [1968] 1 All ER 874 ("*Conway*") held that disclosure could only be ordered if the risk of injury to the public interest is outweighed by the injury to the public interest in the administration of justice. In other words, a balancing exercise must be carried out to determine on the facts of each case which public interest should prevail (see *Ernst & Young v. SJ Asset Management Sdn Bhd & Anor* [2018] MYCA 473).

[74] In this respect as well, we have not overlooked ss. 123 and 124 of the Evidence Act 1950 which are the statutory provisions concerning evidence of affairs of the state (s. 123) and confidential communications (s. 124). Section 123 of the Evidence Act 1950 is not relevant to the instant case as no issue of affairs of the State had been raised and also no affidavit was filed by any person in authority to claim privilege under this provision (see *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146).

[75] We also did not think that s. 124 of the Evidence Act 1950 applied as the police statements in question were not communications made to a public officer in "official confidence". We take the view that privilege under s. 124 is analogous to information provided by informers, for example, where there is a confiding of secrets followed by a corresponding promise of secrecy. In essence, this kind of privilege is really about a breach of a duty to preserve confidence as was alluded by Lord Denning MR in the *NSPCC* case referred to earlier (see para. [14] above).

[76] In *The Public Prosecutor v. Pocku Syed Ismail* [1973] Cri LJ 931, the Indian High Court of Andhra Pradesh held that s. 124 of the Indian Evidence Act (similar to s. 124 of our Evidence Act 1950) cannot be used to deny production of statements recorded during investigations when the recording of such statements is done under a "process of law" (see also *Mahabirji Birajman Mandir v. Prem Narain Shukla and Ors* [1965] Cri LJ 452; *Natha Apparao v. Narulasetti Suryaprakasa Rao* AIR 1951 Mad 864 (1951), (1951) 1 MLJ 526; *Re Loh Kah Kheng* [1990] 1 CLJ 823; [1990] 2 CLJ (Rep) 156; [1990] 2 MLJ 126; *Huzir Hassan v. Ketua Polis Daerah, Johor Bahru* [1994] 2 CLJ 771; [1994] 2 MLJ 385).

[77] In other words, statements recorded in investigations, such as the police statements in the present case, are not made in "official confidence" but by the coercive process of the law. There is no *quid pro quo* of communicating information on the basis of secrecy and confidence here. There was no duty to preserve confidence and there cannot then be any breach of confidence.

[78] In the leading case on the subject, the Federal Court in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 ("*Datuk Ishak*"), however, set aside the decisions of the courts below and disallowed the application for disclosure of the recorded statements from 38 persons under s. 134 of the Securities Commission Malaysia Act 1993 ("SCA 1993"). Although under s. 134 of the SCA 1993, witnesses are compelled to cooperate in the investigation and answer all questions, the Federal Court considered that the statements in question were protected from disclosure under s. 124 of the Evidence Act 1950.

[79] The distinguishing factor, in our view, was that disclosure there was sought for civil proceedings and, unlike the instant case, the Federal Court relied heavily on the contents of an affidavit filed by the investigating officer of the appellant before concluding that the statements were recorded in official confidence and that disclosure was not in the public interest.

[80] Reverting to the instant appeal, our impression was that this claim of public interest was made more out of forlorn hope rather than for cogent reasons. If there was any sensitive information involved or state secrets in the witness statements in question, we could not imagine the prosecution sitting still and not making a concerted effort to bring it to the court's attention. Surely an affidavit would have been filed setting out forceful reasons for non-disclosure. For the above reasons, this argument, in our view, was a non-starter.

Conclusion

[81] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal. In answer to the question that was posed at the outset, we agreed with the appellant that there was a duty on the prosecution to disclose to the defence the police statements of the witnesses offered to the defence which were necessary and desirable to their case. Although there was no statutory obligation to do so, there was indeed such a duty at common law.

[82] To reiterate, we were not impressed with the arguments by the respondent that such statements need not be disclosed as the witnesses could be interviewed by the defence. As alluded to in the case law, such witnesses may refuse to be interviewed and some may not recollect events which had occurred some time ago. Further, as observed earlier, four of the witnesses offered were no longer available.

[83] Also, without the statements, the defence would run the risk of impeachment of such witnesses by the prosecution through the use of the police statements in their custody. This would certainly offend the equality of arms principle and the jurisprudence that has spawned from it.

[84] In our view, there would certainly be a miscarriage of justice if the police statements from especially the deceased persons and others who cannot be brought to court as witnesses were not provided to the defence. We were conscious of the principle that we should not disturb any decision made in the exercise of a judge's discretion. However, as we had indicated, that discretion was exercised on a misapprehension of the law which would result in a miscarriage of justice. Appellate interference was therefore warranted to prevent a miscarriage of justice and to ensure a fair trial.

[85] Accordingly, we unanimously allowed the appeal and set aside the order of the High Court dated 18 December 2018. We granted the application of the appellant as stated in prayers 1(a) to (g) and ordered that a copy of the said statements be provided within two weeks of this order.

[86] However, upon application by the learned DPP, we granted a stay of our order pending the disposal of any appeal to the Federal Court. We were not minded to grant a stay of the trial as there was another party involved who had a right to be heard. The parties were advised to apply before the High Court.

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